
UNITED STATES OF AMERICA

v.

SALIM AHMED HAMDAN

)
) DEFENSE REPLY TO:
) PROSECUTIONS MOTION
) REQUEST FOR PROTECTIVE
) ORDERS
)
)
) August 9, 2004

1. Timeliness. This reply is being filed in a timely manner within the parameters established by the Presiding Officer's Order of 19 July 2004.

2. Relief Sought. The Defense opposes that Protective Orders as sought by the Prosecution on the grounds that the proposed protective orders are overly broad, unsupported by fact and unduly restrict the Defense's ability to confront the evidence against Mr. Hamdan, and as such are not in keeping with a full and fair trial. The Defenses proposes alternative protective orders are attached.

3. Overview. The Defense takes issue with three particular areas of the Prosecutions motion for a protective order in the subject case.

a. The requested order is overly broad and is not supported by specific justification for individual materials and/or witness identities sought to be protected;

b. The protective order sought facially prevents the disclosure of relevant unclassified materials in the Federal Courts and to civilian counsel participating in *Swift v. Rumsfeld* (Ongoing litigation challenging the legality of a Military Commission in Mr. Hamdan's case); and

c. Restrictions following the conclusion of the Commission are beyond the authority of the Presiding Officer.

4. Discussion. The Defense objects to the overly broad and unsupported protection order sought by the government. The government at the onset seeks to limit -the dissemination of all discovery they have provided to the Defense to date. This discovery consists primarily of Reports of Investigation, conducted by law enforcement officers, the majority of these are Reports of Interviews with Mr. Hamdan and other detainees. The remainder of the discovery consists of Mr. Hamdan's medical records, excerpts of news releases, and photographs of other detainees. The government seeks to cover all of this with a protective order.

Military Commission Order No. 1, cited by the government requires counsel for both sides to notify the Presiding Officer of their intent to use protected information as soon as practicable. In compliance with this requirement, the Prosecution has indicated that they will only require having one day of the trial proceedings closed to the members of the press and public. Unless

the government to date has failed to disclose the bulk of the material they intend to introduce at trial, the two propositions stand in stark contrast. On one hand, the government contemplates an open trial wherein they will disclose much of the discovery they have provided to the Defense to the world, on the other hand, prior to such a trial, they seek to significantly limit the Defense's use of this information on the justification that the government potentially suffers harm if it is disclosed. It is extremely hard to see how disclosure in the period leading up to trial will harm the government while its disclosure in trial will not.

What in essence the government is proposing is that the reports of investigation, in the Defense's hands are protected information, but in the Government's hands, the same material should no longer be considered protected and is subject to use in open trial. This simply fails the common sense test. Either material is protected no matter who handles it and thus would be offered only in closed session or it is unprotected. Whose handling it should not determine its status.

Cases cited by the government do not support the broad and unsupported order sought. The Supreme Court in *Waller v. Georgia* indicated that closure should be no broader than necessary to protect the interest and the Court should consider reasonable alternatives to closing proceedings, and it must make findings adequate to support the closure. In the present case, the government to date has provided no specific harm sought to be addressed, but only a generic security threat. Each of the cases cited by the government contained specific security concerns and in each of the cases accommodations were made to ensure that the accused was adequately able to defend him and confront the evidence against him.

Neither of these is present in the Prosecution's proposed order. The Prosecution's order as written prevents the Defense from making any inquiries as to the agents that interrogated Mr. Hamdan. By the plain language of the order the Defense can not consult Mr. Hamdan about any of the agents that interrogated him nor can the Defense inquire to any other person about these agents. The effect is that the Defense is precluded any investigation that might call into question the accuracy, creditability, or circumstances of these perspective government witnesses testimony. Such a prohibition stands in stark contrast to the Military Commissions requirement that the trials be full and fair and the cases cited proposition that the Defense be given adequate substitutes in place of disclosure of witness identity.

The Prosecution also seeks to limit any defense disclosure to official use only, without defining what constitutes official use. Official use is generally understood to mean, disclosure to officials of the United States federal and local government, in the course of their official business. Such officials are of only limited value to the Defense in its preparation. In order to prepare for trial, the Defense intends to consult with potential fact and expert witnesses. Many, if not all of these witnesses are not currently officials with the United States government. Likewise all of the fact witnesses and many of the perspective expert witnesses are not and will not be members of the defense team. To limit the abilities of the Defense to consult only with members of the government and members designated as members of the Defense team precludes the Defense from conducting a complete investigation.

In addition to Commissions proceedings, military defense counsel currently is engaged in ongoing litigation in Federal Court as next friend for Mr. Hamdan. Assisting military defense

counsel in this effort are members of the law firm Perkins Coie and Professor Neal Katyal of Georgetown. Under the proposed protective order, counsel is not permitted to discuss or disclose any of the information provided to these counsel or even to the Federal District Court. Such a prohibition unlawfully limits the rights of habeas and mandamus accorded to Mr. Hamdan via next friend by the Supreme Court in *Rasul v. Bush*, 124 S.Ct. 2686, (2003).

Finally, the portion of the protection order covering actions of the Defense team following the conclusion of Military Commission proceedings is beyond the scope of the authority of the Presiding Officer. The Presiding Officer may only deal with those issues occurring in and pertaining to the Military Commission. Legal and military authority over the defense counsel does not extend beyond the Commission itself. As such the Presiding Officer should decline to issue any orders concerning the conduct of members of the Defense team following the conclusion of a Military Commission.¹

5. Oral Argument. The Defense requests oral argument and believes that such is necessary as the government has yet to provide factual basis for their support request in the form testimony or affidavits regarding threat to witnesses, etc...and as such the Defense requests the opportunity respond following such affidavits.

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¹ Military Defense counsel is familiar with the regulations governing publication by military officers and the use of classified information and will ensure that all other members of his team are informed of these requirements.